Filed 9/29/09 P. v. Tuipulotu CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BILLIE JEAN TUIPULOTU et al., Defendants and Appellants.	B211684 (Los Angeles County Super. Ct. No. TA096071)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Reversed in part and affirmed in part.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Billie Jean Tuipulotu.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Siosaia Tuipulotu.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

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Billie Jean Tuipulotu (Billie) and Siosaia Tuipulotu (Siosaia) appeal from the judgments entered upon their convictions by jury of attempted murder (Pen. Code, §§ 664, 187, subd. (a), count 1).[1] Billie also appeals from his convictions of assault with a firearm (§ 245, subd. (a)(2), count 2), discharge of a firearm in a school zone (§ 626.9, subd. (d), count 3), possession of a firearm by a felon with one prior (§ 12021, subd. (a)(1), count 4), and carrying a loaded firearm with a prior conviction (§ 12031, subd. (a)(1), count 5). In connection with count 1, as to both appellants, the jury found to be true the allegation that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b)(e)(1), (c)(e)(1) and (d)(e)(1), as to Billie, it found that he personally used a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d), and personally caused great bodily injury within the meaning of section 12022.7, subdivision (a), and, as to Siosaia, that a principal was armed with a firearm during the commission of the offense within the meaning of section 12022, subdivision (d). In connection with counts 1 through 4, the jury found to be true the gang allegation within the meaning of section 186.22, subdivision (b)(1). As to counts 1, 2, and 5, the jury also found to be true the allegation that Billie had suffered three prior prison terms within the meaning of section 667.5, subdivision (b), and, as to count 2, that he personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (c). The trial court sentenced Billie to a prison term of 25 years, which included three one-year prior prison term enhancements, plus 25 years to life and Siosaia to a prison term of 19 years.

Appellants contend that (1) there is insufficient evidence to support their convictions of attempted murder because there is insufficient evidence that they had the specific intent to kill, (2) there is insufficient evidence to support the gang allegation, (3) the trial court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter, (4) they suffered egregious and prejudicial prosecutorial misconduct, and (5) the cumulative effect of the errors warrants reversal. Siosaia also contends that (6) CALCRIM No. 400, instructing that an aider and abettor is

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

"equally guilty" of the crime as the perpetrator, is misleading and prejudicial. Billie also contends that (7) there is insufficient evidence to support his prior prison term enhancements, as they were neither admitted nor proven at trial.[2] Each appellant joins in the contentions of the other to the extent applicable to him. (Cal. Rules of Court, rule 8.200(a)(5); see *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

We reverse Billie's prior prison term enhancements and otherwise affirm the judgments.

FACTUAL BACKGROUND

The shooting

On March 12, 2008, Motusaga Toia, who was Samoan, was on duty as a security guard at the Jack in the Box in the City of Carson, across the street from Carson High School. He was wearing a black uniform. At approximately noon, a white and beige Ford Explorer approached him. Billie was the driver and Siosaia was the front passenger. The driver's side was closest to Toia. Toia thought the men looked Samoan.

Billie asked Toia, "Where you from?" and "What's up cuz?" Billie repeated, "What's up cuz?" and yelled, "This is the north side Long Beach, Tongan for Life."[3] During this exchange, Siosaia was mumbling, but it was Billie who said everything. Toia took these comments to mean that appellants were probably in a gang, and there was going to be trouble. He told appellants, "Hey, man, you guys got to leave. There's no

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[2] On June 24, 2009, Billie filed a supplemental letter brief in which he added several contentions omitted from his opening brief but which Siosaia had included in his opening brief and joined Siosaia's contentions to the extent applicable. The supplemental brief also replaced the claim contained in Billie's original brief challenging one of his prior prison terms with his contention that there was insufficient evidence to support any of the prior prison terms.

[3] Toia told Los Angeles County Deputy Sheriff Frankie Lobato that it was Siosaia who yelled "Tongan for Life." Los Angeles County Sheriff's Detective Tim Abrahams also testified that Siosaia told him that Siosaia yelled out, "Tongans for Life, Gangster Crip."

problems over here. These are little kids. If I were you guys, just keep it going." Appellants left.

The Explorer drove a short way, turned around, returned to the Jack in the Box and pulled up next to Toia, the passenger side of the vehicle closest to him. The passenger seat, which had been upright when the car first came by, was now reclined. Billie pointed a gun at Toia, aiming past his brother and through the passenger window as Siosaia "ducked back." Billie shot Toia six times, twice in his right leg and once in his ankle, left leg, stomach, and back. All but the first shot occurred after Toia had fallen to the ground. Appellants then took off.

As a result of the shooting, Toia was hospitalized for a month and suffered damage to his leg and a loss of sensation in his back. The parties stipulated that there was great bodily injury within the meaning of the gun use allegation and section 12022.7, subdivision (a).

Investigation

Four or five miles from the scene of the shooting, police stopped appellants' Explorer, and apprehended appellants. The front passenger seat was no longer reclined, and under it, officers found a .38-caliber semiautomatic gun with four rounds in the magazine, which could hold 10 rounds. The gun was stolen and not registered to either appellant. Two expended shell casings were found behind the front passenger seat.

Police also found three expended casings and two expended bullets at the scene of the shooting. Forensic analysis determined that all of the casings and bullets found at the scene and removed from Toia's body were fired from the gun found in the Explorer.

Seventeen-year-olds A.C. and L.F. witnessed the shooting. They identified Billie at a field showup. Toia identified Billie as the shooter and Siosaia as the passenger from photographic lineups. At trial, A.C., L.F. and Toia identified both appellants.

Appellants' statements

Appellants gave separate oral and written statements to Detective Abrahams. Siosaia admitted membership in the Tongans for Life Crip gang, known as "T.F.L." He said that his cousin, Paki, had been shot and killed in November 2007 by a Blood Samoan

gang member. Appellants went to Carson looking for a Blood Samoan to shoot in retaliation. When they got there, they drove through the Jack in the Box and had a verbal confrontation with a security guard who told them to "get the fuck out of there." Siosaia believed the guard was a Blood Samoan gang member because two people standing near him were wearing red, the color of Blood gangs. Siosaia said that he yelled "Tongans for Life, Gangster Crip."

Billie told the detective that he was also a T.F.L. gang member. He reiterated much of what Siosaia had reported and admitted shooting Toia because he felt disrespected by him. He fired five to six times.

Gang testimony

Long Beach Police Officer Chris Zamora testified as a gang expert. T.F.L. was a predominantly Tongan gang, engaged in criminal activity in north Long Beach. T.F.L. primarily engaged in assaults, strong-armed robberies, gun offenses and gang-related shootings. Officer Zamora testified to two recent felony gun convictions by T.F.L. members. He testified that appellants were both members of that gang. T.F.L. gang members associated with Crip gangs and identified themselves with the color blue. Their rivals were Blood gangs who identified themselves with the color red. The City of Carson had numerous Samoan Blood gangs.

Based on the evidence presented, Officer Zamora opined that Toia's shooting was for the benefit of, and in association with, the T.F.L. gang. Retaliation is part of gang culture, and if a family member of a Crip gang member is the victim of violence by a Blood gang, "[r]etaliation happens now." When a gang member asks, "Where are you from," the gang member is asking with what gang is the person affiliated, which makes the incident gang related. Yelling "Tongans for Life, Gangster Crips" identified appellants as gang members and involved the gang by intimidating other gang members and the public. It enhanced the gang's reputation by informing everyone that members of that gang were committing the crime. The fact that two red-clad individuals were near Toia just before the shooting was significant because the individuals were wearing the colors of a rival gang. The fact that the shooting occurred in Carson where Samoan

Bloods frequented was similarly significant. As the gang expert explained, the shooting became a gang event once the perpetrators involved the gang even if there may have also been a personal motive involved.

DISCUSSION

I. There is sufficient evidence of appellants' specific intent to kill

A. Contention

Appellants contend that there is insufficient evidence to sustain their attempted murder convictions. Billie argues that there was insufficient evidence he intended to kill Toia rather than to injure or scare him. Siosaia argues that as an aider and abettor in the shooting, he must share the specific intent of the perpetrator, and there was insufficient evidence that he shared Billie's intent to kill Toia. While Siosaia yelling "Tongan for Life . . ." evidenced "some form of encouragement to Billie, . . . there was no evidence [Siosaia] intended thereby to encourage more than an assault with a firearm, or an attempted voluntary manslaughter."[4] This contention is meritless.

B. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

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[4] Siosaia does not contend that Billie lacked the intent to kill Toia, but merely that "the record lacks evidence that [Siosaia] understood 'the full extent' . . . of Billie's . . . criminal purpose—to attempt to take [Toia's] life."

"'[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.'" (*People v. Rabanales* (2008) 168 Cal.App.4th 494, 509-510, quoting *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

C. Billie's culpability for attempted murder

Attempted murder requires proof of a direct but ineffectual act towards the killing of another human being with the specific intent to kill another human being unlawfully. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.) Billie challenges the sufficiency of the evidence that he intended to kill, rather than merely injure or scare Toia.

Intent to kill must usually be established by circumstantial evidence, for rarely will the intent of a wrongdoer be proven by direct evidence. "One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) The circumstantial evidence of Billie's intent is overwhelming. He was a T.F.L. gang member who believed that members of the rival Samoan Blood gang had killed his cousin and shot him. He and Siosaia traveled to Carson, where Samoan Blood gang members frequented, to avenge their cousin by shooting a member of the rival gang. After confronting Toia, who Billie believed was a Samoan Blood gang member, he shot him at close range five or six times, all but one of which shots occurred after Toia had fallen to the ground. "[F]iring toward a victim at close, but not pinpoint range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill.'" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690; see also *People v. Lashley, supra,* at p. 945.) Having injured Toia with one shot, it is inconceivable that Billie would have shot him five additional times if he only wanted to injure and not kill him. These facts fully support the jury's implicit finding that Billie intended to kill Toia.

D. Siosaia's culpability for attempted murder as an aider and abettor

The undisputed evidence establishes that Billie shot Toia. Siosaia could therefore only be guilty of the attempted murder as an aider and abettor. Whether a person is an aider and abettor may be shown by circumstantial evidence (see *In re Lynette G.* (1976)

54 Cal.App.3d 1087, 1094) and is ordinarily a question of fact for the trier of fact (*People v. Herrera* (1970) 6 Cal.App.3d 846, 852).

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (§ 31.) A person is liable for aiding and abetting when, (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, or encouraging, or facilitating the commission of the crime, that person (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 386.) The primary actor need not expressly communicate his criminal purpose to the defendant, as that purpose may be apparent from the circumstances. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531-532.)

"[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own *mens rea.* If that person's *mens rea* is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1122 (*McCoy*), italics added.) The aider and abettor can also be less culpable than the perpetrator if that person's *mens rea* is less culpable than the perpetrator. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164 (*Samaniego*).) In the case of murder, the aider and abettor "must know and share the murderous intent of the actual perpetrator." (*McCoy, supra.* at p. 1118.)

There was strong evidence presented from which the jury could have reasonably concluded beyond a reasonable doubt that Siosaia participated in the shooting knowing of Billie's murderous intent and sharing that intent. While Siosaia's presence at the scene of the crime is insufficient by itself to establish him as an aider and abettor (see *People v. Luna* (1956) 140 Cal.App.2d 662, 664), it is a circumstance to be considered along with his companionship with the perpetrator and his conduct before and after the offense

(*People v. Laster* (1971) 18 Cal.App.3d 381, 388; *In re Lynette G., supra,* 54 Cal.App.3d at p. 1094). Here, there was far more than mere presence.

Siosaia and Billie were brothers and fellow T.F.L. gang members, relationships strongly suggesting full disclosure to each other of their plans and intentions. Siosaia told Detective Abrahams that he and Billie went to Carson looking for a Samoan Blood gang member to shoot in retaliation for the murder of their cousin. Appellants believed that Toia was a member of that gang as he was Samoan and was near two people dressed in the Blood gang color. Siosaia was present when Billie asked Toia where he was from. Siosaia admitted yelling, "Tongan for Life," a reference to appellants' gang affiliation. After the Explorer left and then returned, Siosaia had reclined his seat to give his brother a clear shot at Toia. After the shooting, appellants sped off. These facts amply support an inference that Siosaia knew that Billie had a gun, that they were going to avenge the death of their cousin by shooting a rival gang member at close range, and that they were intending to kill him. (*People v. Chinchilla, supra*, 52 Cal.App.4th at p. 690; see also *People v. Lashley, supra,* 1 Cal.App.4th at p. 945.)

II. There is sufficient evidence to support the gang allegation

A. Contention

The jury found the gang enhancement allegation to be true. Appellants contend that there is insufficient evidence to support that finding. They argue that the shooting was committed "to avenge [their] family's honor, not to commit a gang shooting." They point to an absence of evidence that Toia was a gang member, as he was wearing a black security uniform and not the red colors of a Blood gang, and that the two individuals who were wearing red were not targeted. This contention is meritless.

B. The gang enhancement

Section 186.22, subdivision (b)(1)[5] provides that a person convicted of a felony committed "for the benefit of, at the direction of, or in association with any criminal

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[5] All references to section 186.22 are to the version of that statute in effect in 2008, when the charged offenses occurred.

street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" can receive an enhanced sentence. A crime is committed for gang purposes when it is directed at members of a rival gang, a gang sign is flashed and the attackers' gang name is yelled. (See *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1463.) Retaliation against a rival gang and shouting out a gang name constitutes committing an offense for the benefit of, at the direction of, or in association with a criminal street gang. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382-1383.) These indicia of a gang offense are present here.

C. Supporting evidence of gang shooting

This case presents overwhelming evidence that Toia's shooting was gang related. The gang expert opined that the shooting was committed for the benefit of and in association with a criminal street gang. This evidence alone is sufficient to support the gang enhancement. "'[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.'" (*People v. Rabanales, supra,* 168 Cal.App.4th at pp. 509-510, quoting *People v. Young, supra,* 34 Cal.4th at p. 1181.) But there was substantial additional evidence.

As previously stated, appellants, members of T.F.L. gang, went to Carson to retaliate for the killing of their cousin and shooting of Billie by those believed to be members of the rival Samoan Blood gang, who frequented the Carson area. Appellants thought Toia was a Samoan Blood gang member. Billie asked where Toia was from. The gang expert testified that that question made the incident gang related. Siosaia yelled appellants' affiliation with the T.F.L. gang, letting people know which gang was committing the shooting and thereby instilling fear of that gang and enhancing its reputation. The Explorer briefly drove away, then returned to commit a gang-style, drive-by shooting.

Appellants argue that this was not a gang related shooting because Toia was not a gang member, and the motivation for the shooting was personal. These facts are not determinative. Siosaia acknowledged that he "yelled, 'Tongans for Life, Gangster Crip,' because he thought [Toia] was a Blood Samoan, and because the two young men with

[Toia] were wearing red clothing, the Crip [*sic*] color." Appellants acknowledged shooting Toia because they believed he was a rival gang member and were seeking to retaliate for the murder of their cousin by that gang. As the gang expert explained, personal motivation for a shooting does not prevent it from being gang related.

III. The trial court did not err in failing to instruct on attempted voluntary manslaughter

A. Contention

Appellants contend that the trial court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter. Billie argues that "[t]his is a case of heat of passion where the perpetrator was suddenly outraged and he lacked the requisite intent for a cool calculated attempted murder." Siosaia argues that "[t]he court should have given the lesser-included-offense instruction based on the reasonable inference from the circumstantial evidence that [his] intent was to aid and abet Billie's sudden reaction to [Toia's] provocation." This contention is meritless.

B. Required jury instructions

A trial court must instruct the jury sua sponte on general principles of law applicable to the case. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) This requirement includes instruction on lesser included offenses supported by the evidence (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149), """when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] . . . ."""" (*Id.* at p. 154.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the defendant was guilty of the lesser crime. (*Id*. at p. 162.) Any evidence, no matter how weak, will not justify instruction on a lesser included offense. (*Ibid*.)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 11; see also *People v. Thompkins* (1987) 195 Cal.App.3d 244, 255-256; see *People v. Fields* (1996) 13 Cal.4th 289, 304; see also *People v. Lopez* (1992) 11 Cal.App.4th 1115, 1118.) Therefore, if there was

substantial evidence here to support a voluntary manslaughter conviction, the trial court erred in not instructing on that offense.

C. Lack of evidence of sudden quarrel or heat of passion

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in "'limited, explicitly defined circumstances: [including] when the defendant acts in a "sudden quarrel or heat of passion." [Citation.]'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) "Such heat of passion exists only where 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'"'" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion.'"'" (*People v. Breverman, supra,* 19 Cal.4th at p. 163.) "The provocative conduct by the victim may be physical or verbal . . . ." (*People v. Manriquez* (2005) 37 Cal.4th 547, 583), though words alone are generally insufficient. (*People v. Dixon* (1961) 192 Cal.App.2d 88, 91; see *People v. Lucas* (1997) 55 Cal.App.4th 721, 739.)

There was insufficient evidence here to require that the trial court instruct the jury on attempted voluntary manslaughter based upon heat of passion for several reasons. First, when the purported "verbal confrontation" took place, Billie did not immediately shoot Toia. Instead, he drove away and then returned minutes later to do so. While the time between the provocation and shooting was comparatively brief, the alleged provocation was minor, at best. Thus, Billie had time to cool off and act rationally between the claimed provocation and the shooting. (*People v. Breverman, supra,* 19 Cal.4th at p. 166 [a killing is not voluntary manslaughter if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return].)

Second, the claimed provocation, Toia's statement to appellants to "get the fuck out of there," was not such as to cause an "'"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this

passion rather than judgment.'"'" (*People v. Breverman, supra*, 19 Cal.4th at p. 163.) Provocation '"'"of [such] slight and trifling character'"'" is not sufficient to reduce murder to manslaughter. (*People v. Najera* (2006) 138 Cal.App.4th 212, 226.) Ordinary people in our society do not attempt to murder someone for the type of statement alleged to have been made by Toia.

There was also no evidence that Billie's reason was actually obscured, that he lost control of his emotions, or that there was a violent quarrel. (See *People v. Dixon, supra*, 192 Cal.App.2d at p. 90.) He had come to Carson planning to shoot someone. The confrontation was a preplanned effort to shoot a Samoan Blood gang member, belying Billie's claim to have been "mad" or "pissed off" by the few words exchanged. When told to leave, he did not immediately shoot Toia in a fit of rage. Instead, he drove away as requested. This was not the type of spontaneous, emotional reaction that justifies a reduction from attempted murder to attempted voluntary manslaughter.

Siosaia argues that while Toia's statement to appellant to "get the fuck out of there" would not unduly arouse or provoke an ordinary person, we must consider the comment in the gang context. We decline to do so. The applicable standard is the '"'"ordinary [person] of average disposition'"'" (*People v. Carasi, supra*, 44 Cal.4th at p. 1306), not the ordinary gang member.

Third, the uncontradicted evidence was that the shooting was in retaliation for the murder of appellants' cousin and shooting of Billie by a Samoan Blood gang member. Revenge does not reduce murder to manslaughter. (*People v. Carasi, supra*, 44 Cal.4th at p. 1306, citing *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142, 1144.)

Fourth, "To satisfy [the heat of passion test], the victim must taunt the defendant or otherwise initiate the provocation." (*People v. Carasi, supra*, 44 Cal.4th at p. 1306.) Here, appellants initiated the provocation. They drove to Carson looking for a Samoan Blood gang member to shoot and confronted Toia with gang comments. Only then did Toia tell them to leave.

IV. CALCRIM No. 400 was not misleading or prejudicial

A. Background

The trial court instructed the jury on the general principles of aiding and abetting in accordance with CALCRIM No. 400, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. . . . Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (Italics added.) No request for clarification or modification of this instruction was made.

B. Contentions

Siosaia contends that the trial court erred in giving this instruction. He argues that it is defective in failing to inform the jury that an aider and abettor can be guilty of a lesser crime than the perpetrator. CALCRIM No. 400 required the jury to convict Siosaia of attempted murder as an aider and abettor regardless of his mental state, thereby eliminating the need for the jury to make factual determinations regarding his intent.

Respondent contends that Siosaia forfeited this contention by failing to request that the trial court modify or clarify CALCRIM No. 400. Siosaia responds that the failure to object was not surprising because "neither defense counsel nor the trial court could have anticipated the *Samaniego* decision. Therefore, any objection at trial would have been futile." We agree with respondent that this contention was forfeited.

1. Forfeiture

Generally, '"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."' (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134.) We agree with respondent that objection to CALCRIM No. 400 in this case would not have been futile. Our *Samaniego* decision did not work a "sea change" (*People v. Black* (2007) 41 Cal.4th 799, 812) in the law that could not have been anticipated. At the time of the trial in this matter, *McCoy*, upon which our conclusion in *Samaniego* regarding CALCRIM No. 400

was based, had been decided. There was no outstanding authority that unequivocally foreclosed the objection Siosaia makes here.

Even if this contention had been preserved for appeal, we would reject it.

2. Propriety of CALCRIM No. 400

In determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) An instruction can only be found to be ambiguous and misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*Ibid*.) There is no possibility that the jury misunderstood and misapplied CALCRIM No. 400 here.

When an offense is a specific intent offense, "'the accomplice must "share the specific intent of the perpetrator;" this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime."'" (*McCoy, supra,* 25 Cal.4th at p. 1118.) In *McCoy*, the Supreme Court reasoned that "when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own *mens rea.* If that person's *mens rea* is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id*. at p. 1122, italics added.) *McCoy* "leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." (*Samaniego, supra,* 172 Cal.App.4th at p. 1164.) "'[O]nce it is proved that "the principal has caused an *actus reus*, the liability of each of the secondary parties should be assessed according to his own *mens rea*."'" (*McCoy, supra,* at p. 1118.)

In *Samaniego*, we concluded that CALCRIM No. 400's statement that and aider and abettor was "'*equally guilty* of the crime [of which the perpetrator is guilty]'" was generally correct in all but the most exceptional circumstances. (*Samaniego, supra,* 172 Cal.App.4th at p. 1165.) Those exceptional circumstances were presented in *Samaniego.*

Under the instructions given and facts presented in that case, the jury could find the defendants guilty of either first degree premeditated murder or second degree unpremeditated murder. Consequently, CALCRIM No. 400 told the jury that the perpetrator and the aider and abettors had to be found equally guilty, ignoring the mandates of *McCoy* that their level of guilt depended on their individual mental states. Thus, what made the instruction incorrect in *Samaniego* was that the facts supported various scenarios and the instructions permitted the perpetrator and the aider and abettor to be found guilty of two different crimes for the same act based upon whether they had different mental states.

Unlike *Samaniego*, this case does not present the "exceptional circumstances" in which CALCRIM No. 400 is misleading. Here, the jury was instructed that both the perpetrator of the attempted murder and the aider and abettor had to "intend to kill." (CALCRIM Nos. 600 & 401.) Without that intent, neither the perpetrator nor the aider and abettor were guilty. Contrary to *McCoy* and *Samaniego*, there was no possibility here that the jury could find both the perpetrator and the aider and abettor guilty of different crimes. The jury was not instructed on any lesser included offenses, any affirmative defenses or the natural and probable consequences doctrine. CALCRIM No. 400, which stated that the aider and abettor could be equally guilty, was therefore correct in the facts presented and the overall charge to the jury.

V. There was no prosecutorial misconduct

A. Background

During closing argument, the prosecutor made three points to the jury challenged here.

First, he argued: "What they also mentioned to you and to me—which is something I found kind of laughable just about—is that, you know what? We were out to get something to eat and we decided to do this. You know what? I thought about that in advance, and I went and I calculated how many miles is it from North Long Beach to Carson. You know what? It's 24 miles. And I also went and looked, how many Jack in

the Boxes are there between Long beach and Carson? And I stopped counting at about 38."

Defense counsel objected that "[t]hese are facts not presented in the evidence." The trial court sustained the objection, struck the statements and admonished the jury: "Yes. Those were not facts as testimony, and you shall not rely on those statements as factual parts of the trial."

Second, the prosecutor told the jury: "And [Siosaia] never said, I didn't know what my brother was gonna do. . . . No. He says he's part and parcel of this entire deal. So, if he is, he's charged with the exact same activities as his brother. He's not excused. We're already on that third page. Here's what's interesting to know about gang members. They don't operate on the let's-hurt-them theory. That's not how they work. They don't operate under the, you know what? Let's go out and do this, but let's just hurt people."

Defense counsel objected that the prosecutor was stating facts not in evidence. The trial court overruled this objection.

Finally, the prosecutor also repeatedly used the pronoun "they" in referring to the commission of the shooting. He stated numerous times that, "They shot him. . . ." Trial counsel did not object to those instances.

B. Contentions

Appellants contend that they suffered "egregious and prejudicial" prosecutorial misconduct warranting reversal. They argue that in closing argument, the prosecutor (1) stated facts outside of the record, as reflected in the first two arguments stated above, and (2) misled the jury by using the term "they," in the final above-stated argument. The prosecutor "told the jurors, repeatedly, that both appellant and Billie . . . were direct perpetrators of the shooting."

Respondent contends that appellants forfeited their objection to the third argument to the jury. We agree.

C. Forfeiture

Generally, "'"a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.] This general rule, however, does not apply if a defendant's objection or request for admonition would have been futile or would not have cured the harm caused by the misconduct: nor does it apply when the trial court promptly overrules an objection and the defendant has no opportunity to request an admonition. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Siosaia acknowledges that no objection was made in the trial court to the prosecutor's use of the pronoun "they" when referring to who did the shooting. He has failed to show that an exception applies and may therefore not claim that the prosecutor's reference to the shooters as "they" constituted prosecutorial misconduct.

D. Prosecutorial misconduct

The well-established federal and state standards for assessing a claim of prosecutorial misconduct were set forth by our Supreme Court in *People v. Samayoa* (1997) 15 Cal.4th 795, 841: "'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] . . . Additionally, when the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion. [Citation.]"

It is improper to argue facts not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.) The prosecutor may, however, discuss the facts and law as he or she sees fit, advance any theory fairly within the evidence and urge any conclusions deemed

proper. (See *People v. Hardy* (1969) 271 Cal.App.2d 322, 329-330.) "Counsel have a right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel." (*People v. Willard* (1907) 150 Cal. 543, 552.)

We do not find that the prosecutor's alleged references to facts outside the record constituted prosecutorial misconduct under state or federal law. In the first such challenged statement, the prosecutor referred to the distance between appellants' home and the location of the shooting and the number of Jack in the Box locations between them. We do not find that this statement reflects a pattern of egregious conduct, was deceptive or reprehensible or that it infected the trial with fundamental unfairness. It was an isolated instance. In any event, the trial court sustained the objection to it and admonished the jury to disregard it, mitigating whatever minor possible negative impact it might have had on the trial.

In the second challenged argument to the jury, the prosecutor stated that gangs do not operate on the "let's hurt them theory." In the context of the evidence presented, the public's general knowledge about gangs, and the latitude regarding argument by counsel, this statement was permissible argument and, in any event, did not render appellants' trial fundamentally unfair.

VI. There was no cumulative error

Appellants contend that even if the asserted errors were not individually sufficiently prejudicial to warrant reversal, the cumulative effect of the errors denied them their federal and state constitutional right to a fair trial guaranteed by Article I, sections 7 and 15 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. This contention is meritless.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill, supra,* 17 Cal.4th at p. 844.) "Nevertheless, a series of trial errors, though

independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid.*) Because we have rejected appellants' claims of error, there are no errors to cumulate.

VII. There was insufficient evidence to support the prior prison term enhancements

Before trial, the trial court granted Billie's request that the prior prison term allegations be bifurcated. Billie admitted that he had a prior conviction as an element of the firearm possession charges and stipulated during trial that he had a prior felony conviction within the meaning of section 12021, subdivision (a)(1). The prosecutor did not introduce any evidence of the prior prison terms.

The verdict forms asked the jury whether it was true that "pursuant to [Penal Code] section 667.5(b)" Billie had "suffered a prior felony conviction." The jury found the allegation to be true. After the verdicts, the jury was excused without any discussion of the prior prison term allegations.

In sentencing Billie, the trial court stated that Billie had admitted the three prior prison terms and also that the jury found them to be true. It imposed three 1-year prior prison term enhancements under section 667.5, subdivision (b).

Billie contends, and respondent agrees, that there was no evidence to support imposition of the three prior prison terms. We agree.

The prosecution must prove the prior prison terms unless they are admitted by the defendant. (§§ 1025; 1158; *People v. Black* (2005) 35 Cal.4th 1238, 1246-1247, fn. 2, disapproved on other grounds in *Cunningham v. California* (2007) 549 U.S. 270.) Here, there was no evidence introduced to support the prior prison term allegations. Billie admitted a prior conviction as an element of the firearm charges only, and did not admit that that conviction, or any others, were within the prior prison term enhancement. Consequently, we reverse the prior prison term sentences and remand so they can be retried. (*Monge v. California* (1998) 524 U.S. 721.)

DISPOSITION

Billie's three prior prison term sentences within the meaning of section 667.5, subdivision (b) are reversed, and the judgments are otherwise affirmed. The matter is remanded for retrial of the prior prison term enhancements and correction of Billie's abstract of judgment as is appropriate.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ